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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JOHN P. LOMENZO, Secretary of State of the State of New York, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellants,

v.

WMCA, INC., R. PETER STRAUS, JOSEPH DEMAIO, EDWARD LIND, S. THOMAS DELANEY, EDWARD C. BROWN, JAMES J. McCAFFERTY,

Plaintiffs-Appellees,

and

PAUL R. SCREVANE, President of the City Council of the City of New York, JAMES POWER, MAURICE J. O'ROURKE, JOHN R. CREWS and THOMAS MALLEE, Commissioners of the Board of Elections of the City of New York, EUGENE H. NICKERSON, County Executive, Nassau County, FRANCIS X. O'ROURKE, Chairman, Board of Supervisors, Westchester County, WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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and

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants, on behalf of the State of New York, appeal from an order of the United States District Court for the Southern District of New York entered on January 26, 1965, and from an order of that court entered on February 16, 1965 resettling the order of January 26, 1965, insofar as the orders declared amendments to the New York State Reapportionment Compliance Act to be in conflict with the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States and enjoined the appellants from enforcing the Act as amended. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the United States District Court for the Southern District of New York is reported in 238 F. Supp. 916. A copy of the opinion is appended hereto as Appendix A. Copies of the District Court's orders of January 26, 1965 and February 16, 1965 are appended hereto as Appendix B. A prior order of the District Court dated July 27, 1964 is also included in Appendix B.

Prior opinions of the District Court in earlier stages of this litigation are reported in 196 F. Supp. 758, 202 F. Supp. 741 and 208 F. Supp. 368, and prior opinions of this Court are reported in 370 U. S. 190, 377 U. S. 633 and 379 U. S. 694.

Jurisdiction

The suit was originally brought under the Civil Rights Act, 42 U. S. C. §§ 1983, 1988 and 28 U. S. C. § 1343, and 28 U. S. C. §§ 2201, 2202, to invalidate the provisions of the New York Constitution of 1894 and certain statutes relating to the apportionment of seats in the State Legislature. This Court noted probable jurisdiction of two prior appeals.

The proceedings which resulted in the orders now appealed from were brought by certain of the appellees under 28 U. S. C. §§ 2201 and 2202 to have the New York State Reapportionment Compliance Act as amended declared un-

constitutional and to enjoin enforcement of the Act. The orders of the three-judge District Court declaring the Act valid and declaring amendments to the Act invalid, and enjoining appellants from enforcing the amendments, were entered on January 26, 1965 and February 16, 1965, and notice of appeal was filed in the District Court on February 24, 1965. On February 25, 1965 certain of the appellees filed notices of appeal from so much of the orders as declared the Act valid as it stood prior to amendment.

The jurisdiction of the Supreme Court is conferred by 28 U. S. C. § 1253. The following decisions sustain the jurisdiction of the Court to review the orders on direct appeal in this case: *Baker* v. *Carr*, 369 U. S. 186; *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633.

Constitutions and Statutes Involved

The Fourteenth Amendment to the Constitution of the United States and the pertinent provisions of Article III of the Constitution of the State of New York are appended hereto as Appendix C. The New York State Reapportionment Compliance Act, as amended by Chapters 977, 978, 979 and 981 of the New York Laws of 1964, is set forth in Appendix D filed separately herewith.

Questions Presented

1. Does a State statute that apportions the Senate and Assembly of the New York Legislature upon the basis of the population who voted in the 1962 State election satisfy the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

2. Does a State statute that apportions the Senate and Assembly of the New York Legislature upon the

basis of the 1960 citizen population, and that includes a system of fractional voting as to approximately 11% of the votes in the Assembly, satisfy the Equal Protection Clause?

3. Does a State statute that apportions the Senate and Assembly of the New York Legislature upon the basis of the population who voted in the 1962 State election, and that includes a system of fractional voting as to approximately 15% of the votes in the Assembly, satisfy the Equal Protection Clause?

4. Are the legislative apportionment provisions of Article III of the New York State Constitution that were relied upon by the plaintiffs in the District Court still operative, notwithstanding the decision of this Court in *WMCA, Inc.* v. *Lomenzo, 377* U. S. *633*, invalidating the State's prior apportionment scheme?

Statement

Last December, following more than three years of litigation including two decisions by this Court, and comprehensive studies by both a bi-partisan Citizens' Committee and a Joint Legislative Committee, the Legislature of the State of New York enacted the New York Reapportionment Compliance Act. The Act and its amendments fully comply with the constitutional requirement of equality of population among districts and at the same time maintain the State's historic and rational policy of insuring a separate voice to each county in one house of the Legislature. The validity of this legislation is at issue on this appeal.

(a) **Prior Proceedings**: Plaintiffs-appellees brought an action in the United States District Court for the South-

ern District of New York in May 1961 under the Civil Rights Act, 42 U. S. C. §§ 1983, 1988 and 28 U. S. C. § 1343, and 28 U. S. C. §§ 2201, 2202, seeking a declaration that provisions in the New York Constitution of 1894 for apportioning seats in the New York Legislature were violative of the Fourteenth Amendment to the United States Constitution. The complaint also sought to enjoin appellants, who are State officials charged with election duties, from enforcing the challenged apportionment provisions. A three-judge District Court dismissed the complaint in January 1962 for failure to state a claim upon which relief could be granted, on the ground that the issues raised were not justiciable. 202 F. Supp. 741.

In June 1962 this Court vacated the judgment of the District Court and remanded the case for further consideration in light of *Baker* v. *Carr*, 369 U. S. 186, which had been decided subsequent to the District Court's judgment. 370 U. S. 190. In August 1962 the District Court, after a hearing, dismissed the complaint on the merits, concluding that the State apportionment provisions were constitutional. 208 F. Supp. 368. This Court on June 15, 1964, reversed the decision of the District Court and held that the scheme of apportionment embodied in the New York Constitution substantially diluted the weight of the votes of those living in populous areas, in violation of the Equal Protection Clause. The Court remanded the case to the District Court for further proceedings. 377 U. S. 633.

On July 27, 1964, the District Court ordered that, in view of the imminence of the 1964 election, the election be held under the existing apportionment plan, provided that the Legislature should enact a valid apportionment plan by April 1, 1965 (later extended to May 5, 1965); that the legislators to be elected in 1964 should serve for only one year (instead of the two-year term provided in the New

York Constitution); that another election should be held in November 1965; and that the legislators then elected should also serve for only one year until the next regular State election in 1966. (Appendix B, *infra*, at p. B-1.) An appeal by intervenors from the District Court's order of July 27, 1964, was dismissed by this Court on February 1, 1965. 379 U. S. 694.

(b) **Adoption of the Reapportionment Compliance Act.** On July 12, 1964 Governor Rockefeller announced the appointment of a seven-member, bi-partisan Citizens' Committee on Reapportionment, under the chairmanship of Dean William Hughes Mulligan of the Fordham Law School, to "undertake immediately an objective study of significant questions concerning the structure of representative government in the Legislative Branch of New York State" in light of the recent decisions of this Court. On July 23, 1964 the Governor represented to the District Court under oath that he would call a special session of the Legislature to act on reapportionment as soon as the Citizens' Committee reported.

A comprehensive Report was submitted by the Citizens' Committee on December 1, 1964, which stated the following conclusions:

> 1. Reapportionment should ultimately be effectuated by amendment to the New York Constitution. Since by its terms the Constitution cannot be amended before January 1, 1967, and since the law relating to constitutional standards of apportionment is not yet fully defined, the Legislature should comply with the April 1, 1965 deadline prescribed by the District Court by means of a statutory reapportionment on a stop-gap basis.
>
> 2. Apportionment based upon total population, citizen population, or voter population would be con-

stitutional. Substantial reasons exist for concluding that apportionment based upon voter population is more consistent with the "one-man, one-vote" concept, and has more administrative and other advantages, than the prior apportionment based upon citizen population.

3. This Court in *Reynolds* v. *Sims*, 377 U. S. 533, 578-580, recognized a legitimate State interest in maintaining the integrity of political subdivisions. In New York, in particular, a great many public services and activities center upon the several counties, which accordingly merit separate representation if at all possible under the one-man, one-vote principle. Weighted voting or fractional voting in the Assembly provide means of according separate representation to counties in a manner that complies with the one-man, one-vote principle. Fractional voting is the preferable method.

Upon receiving the Report of the Citizens' Committee, Governor Rockefeller promptly convened an Extraordinary Session of the Legislature, pursuant to his prior sworn commitment in the District Court. On December 15, 1964, the Joint Legislative Committee on Reapportionment, which had been created by concurrent resolution in March 1949, issued a Report which agreed in substantial measure with the Report of the Citizens' Committee. It concluded, among other things, that:

1. Stop-gap reapportionment legislation is required prior to a State constitutional amendment on reapportionment.

2. A voter population base is preferable to a citizen population base. Actual voters rather than registered voters provide the more appropriate base, at least until such time as a uniform state-wide system of permanent registration is adopted.

3. Apportionment legislation should adopt fractional voting with respect to a limited number of Assembly seats, so as to provide separate representation for the State's smaller counties in a manner consistent with the one-man, one-vote principle.

The Report of the Joint Legislative Committee expressed concern at the uncertain scope of precise constitutional requirements as to reapportionment. It stated (at pp. 15-16):

> ". . . There is absolute necessity for stability and certainty in the legislative process, and the assurance that the acts of the Legislature will not remain subject to continuing challenge.
>
> ". . . Accordingly, we would be derelict in our duty if we recommended to your Honorable Bodies that complete reliance be placed in a single apportionment and districting plan which may or may not withstand constitutional attack."

Accordingly the Joint Legislative Committee recommended, and the Legislature adopted, a series of four alternative apportionment Plans, in the form of the Reapportionment Compliance Act and three successive amendments thereto. (Appendix D, filed herewith.) The Legislature considered the Plan embodied in the third amendment to be the best for the State, the Plan embodied in the second amendment to be the next best, and so on. It intended that if the best Plan were invalidated, the next best would automatically take its place. Under New York law the invalidation of an amendment to a statute results in the continued efficacy of the statute as it stood prior to the amendment.

The Reapportionment Compliance Act (Chapter 976 of the Laws of 1964, hereinafter referred to as Plan A) reap-

portioned the Senate and Assembly on the basis of the citizen population as determined by the 1960 census.

A first amendment to the Act (Chapters 977 and 978, hereinafter referred to as Plan B) superseded Plan A with an apportionment based upon the population who voted in the 1962 State election, which was the most recent Statewide election for which figures were available.

A second amendment (Chapter 979, hereinafter referred to as Plan C) superseded Plans A and B with an apportionment based upon the 1960 citizen population as in Plan A, and also provided for fractional voting for all purposes in the Assembly, for Assemblymen representing (1) counties with less than the population ratio required for a full vote, and (2) portions of counties with a substantial remainder in excess of one full ratio. Under Plan C, 147 of the 165 Assembly votes are held by Assemblymen having one vote each, and the remaining 18 votes are divided among 39 Assemblymen having from ⅙ to ¾ of one vote in accordance with the population of their districts.

The third amendment (Chapter 981, hereinafter referred to as Plan D) superseded the previous Plans with an apportionment based upon the 1962 voter population as in Plan B, and provided for fractional voting in the Assembly as in Plan C, except that under Plan D, 127 of the 150 Assembly votes are held by Assemblymen having one vote each, and the remaining 23 votes are allocated among 47 Assemblymen having fractional votes.

The Reapportionment Compliance Act, as thus amended, took effect January 1, 1965. In addition, implementing legislation was adopted to adjust the election machinery of the State so as to enable the 1965 election of legislators to take place pursuant to the new reapportionment as directed by the District Court.

(c) **The Proceedings Below.** On December 31, 1964 certain of the appellees moved in the three-judge District

Court for an order declaring all four Plans invalid, as violating the Federal and State Constitutions. Appellants had moved for an order declaring that the Act complies with the District Court's order of July 27, 1964. After a hearing, in an order dated January 26, 1965 (Appendix B, *infra*, at p. B-4), and resettled on February 16, 1965 (Appendix B, *infra*, at p. B-7), the District Court declared Plans B, C and D invalid under the Fourteenth Amendment, and enjoined their enforcement. It declared Plan A to be valid.

The District Court refused to pass upon allegations that the Act violated certain State constitutional and statutory requirements. It nevertheless stated that the provisions of Article III of the State Constitution relating to apportionment are invalid only to the extent that they are in unavoidable conflict with the decision of this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964). It ruled specifically that all of the apportionment provisions of the State Constitution alleged by appellees to be violated by the Reapportionment Compliance Act as amended are still operative, notwithstanding this Court's invalidation of the existing apportionment scheme.

The District Court held that appellees' allegations that the Senate and Assembly districts established by Plan A were gerrymandered for partisan advantage did not state a claim under the United States Constitution upon which relief could be granted.

The District Court's reasons for invalidating Plans B, C and D, as set forth in its opinion of February 1, 1965 (Appendix A, *infra*), were essentially as follows:

(1) Fractional-vote Assemblymen from sparsely-populated areas of the State would be able to give their constituents relatively greater representation than the

admittedly more influential full-vote Assemblymen, with respect to participation in the work of legislative committees and party caucuses, floor debates, discussions with other legislators and executive agencies, and like matters "that have nothing directly to do with voting."

(2) Apportionment based upon the 1962 voter population discriminates unconstitutionally against New York City, notwithstanding the possibility of sound State policy reasons for using it, because the City's share of the total apportionment base, which is 41.9% using the voter population, would be 45.7% if citizen population were used instead.

On January 20, 1965 an action was brought in the Supreme Court of New York to invalidate the Reapportionment Compliance Act. By stipulation the proceeding was limited to a review of Plan A, except that the court was requested to determine any common questions of law applicable to all of the Plans. The court held, on March 15, 1965, that the provision in Article III, § 2 of the State Constitution limiting the size of the Assembly to 150 members is still operative notwithstanding this Court's decision in *WMCA* v. *Lomenzo,* and that consequently Plan A, which had been upheld by the District Court, was invalid since it established an Assembly of 165 members. *Matter of Orans,* 153 N. Y. L. J. No. 50, p. 14, col. 4 (Sup. Ct. N. Y. Co. March 15, 1965). The New York Court of Appeals affirmed that decision on April 14, 1965. 15 N. Y. 2d 339.

The Questions Are Substantial.

1. The Issues Are of Unusual Public Importance.

The New York Legislature has reapportioned on an equal popoulation basis in accordance with the principles

of *Reynolds* v. *Sims*, 377 U. S. 533 (1964), and *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964). The District Court's invalidation of this legislation poses vital and unresolved questions as to the scope of permissible State apportionment under the Equal Protection Clause.

The public importance of these questions can hardly be overstated. The reapportionment decisions of the Court have created the necessity for almost all of the States to reapportion their legislatures. Efforts are under way throughout the nation to reapportion in compliance with the general principles enunciated by this Court. It is important that State legislatures know as promptly and authoritatively as possible the constitutional limitations governing their reapportionment responsibilities. The uncertainties go beyond the State legislatures, for the District Courts are also applying the one-man, one-vote principle to the apportionment of local legislative bodies.*

The District Courts also require authoritative interpretation, consistent with this Court's determination to define applicable constitutional principles on a case-by-case basis. In the absence of such guidelines, conflicting decisions and further years of confusion and uncertainty are inevitable.

The brief period since the Court's 1964 reapportionment decisions has already brought conflicting decisions by lower courts on the specific issues presented by this appeal. Contrary to the decision of the District Court herein, other State and Federal courts have concluded that the use of fractional voting does not violate the Federal Constitution. Thus, in *Thigpen* v. *Myers*, 231 F. Supp. 938

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*E.g., *Bianchi* v. *Griffing*, Civil Action No. 62-C-821 (E. D. N. Y. February 1, 1965) (Board of Supervisors of Suffolk County, New York); *McMillan* v. *Wagner*, Civil Action No. 2160, (S. D. N. Y. March 22, 1965) (New York City Board of Estimate); *Ellis* v. *Mayor and City Council of Baltimore*, 234 F. Supp. 945 (D. Md. 1964) (Baltimore City Council); *accord*, *State ex rel. Sonneborn* v. *Sylvester*, 132 N. W. 2d 249 (Wis. Sup. Ct. 1965) (County Board of Supervisors).

(W. D. Wash. 1965), a District Court invalidated the apportionment of seats in the Washington Legislature, and ordered the use of an interim remedy that included fractional and weighted voting. The District Court stayed its order, however, so as to permit the Legislature to reapportion itself.

In *Maryland Committee* v. *Tawes,* 228 Md. 412, 180 A. 2d 656 (1962), *decision on remand aff'd,* 229 Md. 406, 184 A. 2d 715 (1962), *rev'd,* 377 U. S. 656 (1964), the Court of Appeals of Maryland, in suggesting the relief that the court below might grant, concluded, 228 Md. at 439, 180 A. 2d at 670-671:

> "A reapportionment Act might take the form of an actual increase or decrease in the number of seats in either or both houses of the General Assembly apportioned to the several political subdivisions of the State, *or might adjust the number of votes or the fractional votes to be cast by the members so as to achieve the same relative voting strength as if an actual reapportionment of membership (with each member having one vote) were made."**

The District Courts are also divided on the constitutionality of the use of voters as the basis for apportioning seats in a State legislature. In *Holt* v. *Richardson,* 238 F. Supp. 468 (D. Hawaii 1965), the District Court upheld the validity, under the Equal Protection Clause, of an apportionment of seats in the Legislature of Hawaii which was based upon voters registered at the last general election. The court held, 238 F. Supp. at 472, that total population is not the only basis upon which apportionment of state legislatures can constitutionally be based, relying upon the following language of this Court in *Maryland Committee* v. *Tawes,* 377 U. S. 656, 673 (1964):

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*Emphasis in quotations throughout this Statement is supplied.

> "Rather, the proper, and indeed indispensable, subject for judicial focus in a legislative apportionment controversy is the overall representation accorded to the *State's voters,* in both houses of a bi-cameral state legislature."

Contrary to the *Holt* decision, in *Ellis* v. *Mayor and City Council of Baltimore,* 234 F. Supp. 945 (D. Md. 1964), a District Court held invalid, under the Equal Protection Clause, a provision of the Baltimore City Charter that apportioned seats in the City Council of Baltimore upon the basis of registered voters.

These conflicting decisions on the issues presented by this appeal underscore the need and importance of a determination by this Court as to critical questions not involved in the Court's prior decisions.

It is basic to our Federal system that State legislatures be permitted flexibility in dealing with State problems within the framework of the Federal Constitution, particularly in an area as fundamental and sensitive as legislative apportionment. The structure of representation is at the heart of a State's political processes. The area of permissible State policy determination should not be impaired for insubstantial, problematical or speculative reasons.

This Court noted in *Reynolds* v. *Sims,* 377 U.S. at 586, that ". . . legislative reapportionment is primarily a matter for legislative consideration and determination. . . . [T]he primary responsibility for reapportionment . . . rests with the legislatures." The District Court in this case misconceived the scope of Equal Protection requirements. Moreover, it unnecessarily intruded into areas of permissible State policy in a manner which, unless reversed, will erroneously influence the reapportionment efforts of legislatures and courts throughout the nation.

2. The Use of Fractional Voting in New York Reapportionment Is Constitutional.

Fractional voting was adopted in Plans C and D of the New York Reapportionment Compliance Act in order to continue, in a manner fully consistent with the "one-man, one-vote" constitutional requirements, an historic State policy embodied in Article III of the State Constitution to provide separate county representation in one house of the Legislature. In *Reynolds* v. *Sims*, 377 U. S. at 580, this Court stated:

> "... [A] state can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government."

The New York Legislature selected fractional voting as the only practical method of achieving this objective. Fractional voting is the effectuation of a rational State policy which involves no invidious discrimination under the Equal Protection Clause.*

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*The report of the Joint Legislative Committee on Reapportionment, dated December 15, 1964, summarized the advantages of fractional voting as follows: (1) It would preserve the traditional State policy of guaranteeing at least one Assemblyman to every county (joining Hamilton and Fulton as one). (2) It would provide people in less populous counties, whose interests might be different from those of neighboring counties, an independent voice in the Assembly. (3) It would permit the creation of Assembly districts on a basis which is distinct from Senatorial districts, thus supporting a principal reason for bicameralism. (4) Only a relatively small number of Assemblymen would have less than a full vote. (5) The inordinate strength given by weighted voting to a small group of legislators, thus permitting dominance, would be dissipated since the majority would have only single votes.

In New York State since 1777 the county unit has been accorded independent significance and representation in the Legislature. The State Constitution of 1777 and all subsequent State Constitutions have apportioned separate representation to the counties. Since 1821 the Constitution has guaranteed to each county (except Hamilton, which is combined for this purpose with Fulton) at least one member of the Assembly. The State of New York is one of the most diversified States in the union. The presence of at least one Assemblyman per county has enabled legislators to express local community concerns. It is true in New York, as was the case in *Reynolds* v. *Sims*, 377 U. S. at 580-581, that "much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of particular political subdivisions." Indeed, fully one-fourth of all legislation enacted by the Legislature originates with local government units.

The Legislature has assigned increasing governmental responsibilities to the State's counties. An outline of these responsibilities covers twelve pages in the Report of the Citizens' Committee on Reapportionment. These activities include such extensive and important public functions as police protection, prosecution of crime, legal assistance to indigents accused of crime, courts of law, water supply, sewage and drainage facilities, watershed protection, county planning, public health services, hospitals, libraries and museums, community colleges, transportation facilities, public assistance and care, youth and veterans services, housing regulation, conservation, parks and recreation, highways, probation services, civil service, fire training and mutual aid, civil defense and election procedures. The Citizens' Committee noted that each of these functions brings the counties into direct contact with the Legislature.

Many counties have unique governmental problems. It would be difficult for one individual to represent effectively

a number of counties and to voice the needs and views of all. Because of the peculiar importance of counties in New York as political and governmental units, and the historic State policy of according them independent legislative representation, the State Legislature attempted to comply with this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964), in a manner which would permit continued separate county representation in the Assembly. These objectives could be accomplished in only one of two ways: (a) by increasing the size of the Assembly to the unwieldy and impractical number of 1142 members, or (b) by a system of fractional voting or weighted voting.*

The Legislature chose a system of limited fractional voting, as a stop-gap, interim measure pending the adoption of a constitutional amendment relating to apportionment. The plan of fractional voting gives at least one Assemblyman to each county but provides for fractional votes, for all purposes, for (a) counties with less than the population ratio required for a full vote, and (b) portions of counties with a substantial remainder in excess of a full ratio.

Under this system additional Assemblymen are assigned to the more populous counties in numbers sufficient to remedy existing malapportionment. Each of such coun-

*In a weighted voting plan certain legislators have a single vote, but most have more than one vote, based upon the population of the districts they represent. In a fractional voting plan no legislator has more than one vote. The Report of the Joint Legislative Committee on Reapportionment illustrated the difference between weighted and fractional voting as follows: If there were two counties with a population of 75,000 and 900,000, respectively, under weighted voting each county would be entitled to a single Assemblyman, with the Assemblyman from the small county having one vote and the Assemblyman from the large county having twelve votes. Under fractional voting there would be one Assemblyman from the small county with three-fourths of a vote, and nine Assemblymen from the large county who would each have one vote. A fractional voting system avoids the hazard, inherent in the weighted voting system, of having an undue concentration of power in the hands of a few legislators.

ties is divided into a sufficient number of districts to provide representation commensurate with its population. In the case of counties whose population is insufficient to warrant a single Assemblyman, instead of combining them into multi-county districts, each of them is assigned an Assemblyman with a fractional vote based upon the county's population. The smaller counties receive no greater voting strength than they would if they were combined in multi-county districts, and the larger counties receive all of the voting strength to which they would be entitled under a multi-county plan. Voting strength is allotted in accordance with the population base, but a right to be heard, and a right to listen, is provided to each of the counties. This is a system which provides that "fair and effective representation for all citizens" which is the basic aim of legislative apportionment. *Reynolds* v. *Sims*, 377 U. S. at 565-566. Without a system of fractional voting the people of more than 30 of New York's smaller counties would be deprived of their separate and traditional representation in the Legislature.

Under Plan C of the Reapportionment Compliance Act the Assembly consists of 186 members. These members have a total of 165 votes, 147 of which are cast by members having one vote each, and 18 of which are shared by 39 members who have ⅙ to ¾ of a vote each. Thus, about 11% of the votes in the Assembly are cast by Assemblymen with fractional votes. Under Plan D the Assembly consists of 174 members who have a total of 150 votes, 127 of which are cast by member having one vote each, and 23 of which are shared by 47 members who have ⅙ to ¾ of a vote each. Thus, about 15% of the votes in the Assembly are fractional votes.

It has not been displuted that the fractional voting Plans comply with this Court's requirement to apportion among districts of equal population. The fractional voting Plans

provide a voting weight in each legislative body, for each county, commensurate with the county's percentage of the base population.

Notwithstanding this fact, the District Court concluded that fractional voting violates the Equal Protection Clause on the ground that legislators engage in functions other than voting, such as participation in the work of committees (although fractional voting would be used for all purposes, including voting in committees) and caucuses, debating on the floor of the Legislature and discussions with other legislators and agencies. The District Court stated that an Assemblyman with one-sixth of a vote "can theoretically give each constituent six times as much representation in these respects as the Assemblyman who represents a full district." (Appendix A, *infra*, at p. A-15.)

It can as easily and correctly be said that a man with one full vote is more influential than six men with a mere sixth of a vote each. The insubstantial and speculative differences, unrelated to voting weight, on which the District Court relied, hardly rise to the level of a dilution of the right to vote.* This Court has made clear that there is a wide range available to the States to effectuate rational policies of apportionment in the light of local conditions and requirements, so long as the overriding equal population principle is substantially satisfied. *Reynolds* v. *Sims*, 377 U. S. at 579.

Indeed, the Court has indicated that, even with respect to voting strength, mathematical exactness is not required

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*The concept that political units not entitled to voting rights may properly be given a voice in a legislative body is reflected in the statutes which gave certain Territories of the United States the right to send a delegate to the House of Representatives with a right to participate in floor debate but not to vote. See, *e.g.*, 31 Stat. 158 (1900), 48 U. S. C. § 651 (1958).

by the Equal Protection Clause. As the Court stated in *Reynolds*, 377 U. S. at 579:

> "So long as the divergencies from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature."

To the same effect is *Lucas v. Colorado Gen. Assembly*, 377 U. S. 713, 735, n. 27 (1964).

An analogous problem was before this Court in *Fortson v. Dorsey*, 379 U. S. 433 (1965), where the Court sustained the validity of the Georgia 1962 Senatorial Reapportionment Act, even though the Act involved disparities among counties as to the manner of representation. Under that statute most of the senatorial districts were multi-county districts made up of one to eight counties each. Voters in each of these districts elected a senator by a district-wide vote. The remaining districts were allotted among the most populous counties, but voters in each of these districts did not elect a senator by a district-wide vote; instead they joined with the voters of the other districts of the same county in electing all the county's senators by a county-wide vote. The District Court granted summary judgment, holding that the difference in the treatment accorded voters in the two classes of senatorial districts violated the Equal Protection Clause.

This Court reversed, on the ground that, in the absence of any substantial mathematical inequality of population among the districts, the Georgia Act did not deny equality of voting weight. The Court noted that each representative in a multi-district county represented the entire county,

and not just his own district. Thus, as here, *Fortson* involved differences in manner of representation unrelated to equality of votes. The Court did not consider of constitutional dimension the fact that a representative owing his allegiance to a single district might be able to represent his constituency's interest more effectively than if he were responsible to an entire multi-district county. The Court stated, 379 U. S. at 438:

> "If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not 'approximately equal in weight to that of any other citizen in the state.' "

The same reasoning is applicable to the validity of fractional voting in the New York Assembly. As in *Fortson*, insubstantial differences between fractional-vote districts and full-vote districts do not deny equality of voting weight.*

The District Court in the present case found fractional voting "particularly vulnerable" because "fractional districts are enjoyed mainly by the sparsely populated areas of the state." (Appendix A, *infra*, at p. A-15.) Even if true, this fact would not invalidate the fractional voting Plans, because any differences between the two types of districts do not effectuate an unconstitutional inequality of voting weight. As already indicated, the principal legislative pur-

*Both fractional voting systems and weighted voting systems have been regarded as constitutional by a number of commentators. See, *e.g.*, Advisory Commission on Inter-governmental Relations, *The Apportionment of State Legislatures*, at 32 (1962); Auerbach, *The Reapportionment Cases: One Person, One Vote—One Vote, One Value*, 1964 THE SUPREME COURT REVIEW, 1, 42.

pose in adopting fractional voting was to give a voice to counties with a population not otherwise sufficient to entitle them to separate representation, in a manner consistent with the one-man, one-vote requirement. It was therefore to be expected that counties with the smallest populations would be fractional districts.

The fact is, however, that fractional voting is not limited to such counties. Fractional votes are also assigned to more populous counties that have a substantial remainder in excess of the population entitling them to a full-vote Assemblyman; a substantial number of fractional votes are thus allocated to urban areas.

Although the sparsely populated counties are fractional vote districts, the fractional voting Plans are not designed to, and do not in fact, place urban voters at a disadvantage in the Legislature. Such voters have all the electoral power to which their numbers entitle them. This is not a situation, such as was before the Court in prior cases, in which a legislative vote belonging to one person is arbitrarily taken away and given to another. Here there is no dilution of votes. On the other hand, if sparsely populated counties were merged into larger ones for purposes of representation, more than 30 counties might receive no effective representation at all. Fractional voting attempts to insure that substantial groups of people with common governmental problems will not be submerged into permanent minorities without representation.

The fractional voting provisions of Plans C and D comply fully with the long-established standards governing adjudication under the Equal Protection Clause. These standards were explained in *McGowan* v. *Maryland,* 366 U. S. 420, 425-426 (1961), as follows:

> ". . . the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which

> affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Again in *Baker* v. *Carr*, 369 U. S. 186, 226 (1962), the Court stated with respect to the application of the Equal Protection Clause to reapportionment cases:

> ". . . it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." [Emphasis in original.]

Fractional voting in the New York Reapportionment Compliance Act is not arbitrary or capricious. It is an effectuation of a well-considered, historic policy to grant separate representation to each of the State's counties, which are the primary units of the State government. In the light of this rational State policy, insubstantial and speculative differences between fractional voting districts and other districts, unrelated to equality of voting strength, are not of constitutional dimension.

3. The Use of Actual Voters in New York Reapportionment is Constitutional.

The Joint Legislative Committee on Reapportionment recommended, and the Legislature adopted in Plans B and

D, a reapportionment based upon the number of persons who voted in the last gubernatorial election. The Committee concluded (at p. 7) that, "in a representative democracy, the use of a voter base best reflects the spirit of the 'one-man, one-vote' doctrine."

The Committee regarded a voter base as preferable to other possible measures of population for the additional reasons that it is more accurate; is less expensive; is fairer because it excludes persons who are arbitrarily included in the districts by the Federal census, such as prisoners, hospital inmates, out-of-state students residing in the State at colleges, and seamen aboard ships in the State's harbors; is used successfully in other States; and acts as a brake on concentrated political power in low-voting districts. The Committee also noted that a voter base permits the use of population figures more recent than those reflected in the decennial Federal census, thereby giving increased representation to areas of rapid population growth.

The validity of the State's voter base under the Equal Protection Clause is clear from this Court's reapportionment decisions. Indeed, a voter base is the measure of population best calculated to implement the principle underlying those decisions, for the touchstone of the reapportionment cases is equality among voters.

Thus, in *Baker* v. *Carr*, 369 U. S. 186, 207-208 (1962), the Court stated:

> "The injury which appellants assert is that this classification disfavors *the voters* in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis *voters* in irrationally favored counties. A *citizen's right to a vote* free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally."

Again in *Reynolds* v. *Sims,* 377 U. S. 533, 565-66 (1964), the Court stated:

> "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation *by all voters* in the election of state legislators. *Diluting the weight of votes because of place of residence impairs basic constitutional rights* under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race."*

The Court also stated in *Reynolds,* 377 U. S. at 577, in a passage relied upon by the District Court in another context:

> ". . . the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents, or citizens, or voters.* Mathematical exactness or precision is hardly a workable constitutional requirement."

In the present case, the Court's decision in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964), struck down New York's prior apportionment provisions on the ground that they discriminated against *voters* living in the State's more populous counties. The Court stated as the basis for its decision, 377 U. S. 653-54:

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*Similar statements are contained in the *Reynolds* decision at pp. 554, 555, 557, 558, 559, 560, 561, 562, 563, 565, 566 and 568.

> "We have examined the state constitutional formulas governing legislative apportionment in New York in a detailed fashion in order to point out that, as a result of following these provisions, *the weight of the votes of those living in populous areas is of necessity substantially diluted in effect.* However complicated or sophisticated an apportionment scheme might be, it cannot, consistent with the Equal Protection Clause, result in a significant undervaluation of *the weight of the votes* of certain of a State's citizens merely because of where they happen to reside. New York's constitutional formulas relating to legislative apportionment demonstrably include a built-in bias *against voters* living in the State's more populous counties."

Since it is equality of the voting weights of voters which is required by the Equal Protection Clause, it follows that the optimum method of apportionment is on the basis of equal numbers of voters. While it should also be constitutionally permissible for a State to apportion on the basis of total population or citizen population, the use of a voter base is most consistent with Equal Protection requirements.

If the ratio of voter population to total population were approximately the same in every district in the State, it would be relatively inconsequential which of them was used as the basis for apportionment. In fact, however, the ratio of voters to total population in New York varies substantially throughout the State. In the 1960 election, for example, the number of voters per 100 inhabitants ranged from 30.5 in Tompkins County to 60.8 in Putnam. Therefore, as the Citizens' Committee and the Joint Legislative Committee each pointed out, apportionment on the basis of total population would substantially increase the voting weight of voters who live in districts having a relatively

large percentage of non-voters.* Such an apportionment would correspondingly dilute the voting weight of voters in districts in which larger percentages of the population vote.

By way of illustration, the Report of the Joint Legislative Committee noted that in the 1954 general election, the 11th, 12th, 17th and 18th State Senatorial Districts in Kings County each had a citizen population of approximately 288,000, whereas the number of votes actually cast for Senator in these Districts were approximately 51,000, 105,000, 109,000 and 55,000, respectively. Thus voters in the 11th and 18th Districts had a voting weight of about twice that of voters in the 12th and 17th Districts. Similar results occurred in the 1960 election. The use of a voter base avoids such disparities, and best effectuates the one-man, one-vote concept.

Several States have used some form of voter base in apportioning legislative seats. MASSACHUSETTS CONSTITUTION, Amend. LXXI; RHODE ISLAND CONSTITUTION, Amend. XIX; TENNESSEE CONSTITUTION, Art. II, §§ 4-6; TEXAS CONSTITUTION, Art. III, § 25; ARIZONA CONSTITUTION, Art. IV, Pt. 2, § 1; HAWAII CONSTITUTION, Art. III, §§ 2-4. The number of actual voters has also been used for some time as a base in apportioning representation for many purposes in New York. See, *e.g.*, New York Election Law, §§ 12(1), 132(1).

The Joint Legislative Committee also determined that the use of actual voters is preferable to registered voters in New York State because of the absence of a uniform state-wide system of voter registration. Three types of voter registration currently exist in New York: annual

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*See Silva, *The Population Base for Apportionment of the New York Legislature*, 32 Fordham L. Rev. 1, 19 (1963). To the same effect see the statement of Francis E. Rivers in the Report of the Citizens' Commitee on Reapportionment, Appendix 11.

personal, permanent personal and permanent non-personal. As a result, the ratio of actual voters to registered voters varies substantially from county to county. In the election of 1960, for example, the number of actual voters per 100 registrants ranged from 51.8 in Sullivan County to 95.6 in Delaware County. Thus, if Assemblymen had been apportioned on the basis of registered voters, one voter in Sullivan County would have had almost twice as much electoral power as one in Delaware County.

The Joint Legislative Committee recommended the use of voters in the 1962 general election, since it reflected the most recently available figures. It is significant, however, that approximately the same percentage of the total state-wide vote was cast in 1960, 1962 and 1964 in the counties in which appellees reside, so that no significant change in representation would have resulted from the utilization of the elections of 1960 or 1964 rather than 1962. The percentages of the total state-wide vote cast in the pertinent counties in each of the last three elections are as follows:

	1960	1962	1964
A. Six counties (New York, Bronx, Kings, Queens, Nassau, Suffolk)	53.25	53.22	54.02
B. Ten most populous counties (New York, Bronx, Kings, Queens, Nassau, Suffolk, Westchester, Erie, Monroe, Onondaga)	72.03	72.24	72.64
C. New York City	42.59	41.91	42.05

The District Court conceded that there may be "sound policy reasons" for the State's adoption of a voter base, citing the Reports of the Citizens' Committee and of the Joint Legislative Committee. The District Court also stated that it was expressing no opinion as to the validity of a voter base under other circumstances. It nevertheless concluded

that the adoption of a voter base amounted to an unconstitutional discrimination "[u]nder the circumstances of this particular case," for the sole reason that it gave to New York City a 41.9% share of the total apportionment base, as compared with a share of 45.7% which the City would have received under a citizen base. (Appendix A, *infra,* at pp. 17-18.)

But the fact that a voter base results in a 3.8% difference in New York City's share of the total apportionment base, as compared with some other method, hardly renders the voter base unconstitutional. So long as a voter base is a generally permissible method of compliance with the Equal Protection Clause, under the District Court's analysis residents of areas other than New York City could appropriately complain that the use of a citizen base would unfairly deprive them of a 3.8% share of the apportionment base that would be theirs under a voter base. The Equal Protection Clause protects the people of the rest of the State as well as those who live in New York City. "A citizen, a qualified voter, is no more nor less so because he lives in the city or on the farm." *Reynolds* v. *Sims,* 377 U. S. at 568. If the District Court's analysis of what constitutes an unconstitutional discrimination is correct, it has merely substituted one discrimination for another.

Figures can be devised to prove almost any thesis. And reasons can be advanced against any plan. The fact is that the District Court suggests no intrinsic reason why a voter base does not comply fully with constitutional requirements. Where the New York Legislature has determined, on the basis of sound policy reasons not challenged by the District Court, that apportionment on the basis of actual voters is in the best interest of the State, is preferable to other bases and is fairest to all, the fact that somewhat different figures would have resulted from a

different choice does not render the State's determination unconstitutional.

4. The District Court Erroneously Ruled That Provisions of the Prior State Apportionment Scheme Which Was Invalidated by This Court Nevertheless Remain Operative as a Matter of Federal Law.

Certain of the appellees alleged in the District Court that the reapportionment Plans violate apportionment provisions contained in Article III of the State Constitution. The District Court refused to pass upon these State questions, but it nevertheless ruled that, as far as Federal Law was concerned, all of the apportionment provisions in Article III relied on by the plaintiffs continue to remain operative, notwithstanding the invalidation of the State apportionment scheme by this Court. (Appendix A, *infra*, at p. A-11) The District Court thus permitted the State courts to resurrect segments of the invalid scheme in order to void the Reapportioinment Compliance Act.

The District Court's ruling misconceived the permissible scope of legislative interim reapportionment powers. In remanding this case last June, this Court recognized the broad powers of the District Court "to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan." 377 U. S. at 655. Indeed, the Court indicated that District Courts and State legislatures may devise appropriate stop-gap remedies without fully complying even with Federal constitutional requirements. *Reynolds* v. *Sims*, 377 U. S. at 586-587.

The scope of permissible flexibility in devising interim measures was recognized by the District Court in this case when it ordered a one-year term for legislators elected in 1964 and 1965, even though Article III of the State Constitution requires two-year terms for legislators, a provision

that clearly was not a part of the invalidated apportionment scheme.

This Court further indicated the appropriate scope of legislative power to reapportion when it stated in *Maryland Committee* v. *Tawes*, 377 U. S. at 675-676:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements."

The District Court's sweeping generalization as to the continuing validity of the former apportionment provisions unduly restricts the scope of legislative power to fashion a stop-gap remedy for malapportionment. But further, certain of the provisions of the State Constitution which the District Court ruled to be still operative are so basic to the prior scheme of apportionment that they necessarily fell when this Court struck down New York's apportionment scheme.

For example, certain of the appellees relied in the District Court upon the provisions of Sections 4 and 5 of Article III of the State Constitution to the effect that apportionment should be based upon citizen population. Because this Court invalidated the Article III apportionment scheme on the ground that it discriminated among voters, the Legislature reapportioned in Plans B and D on the basis of actual voters, as being more consistent with the one-man, one-vote principle. Yet the District Court has ruled that the Article III requirement of a citizen base continues to survive the *WMCA* decision. It thereby permits

invalidation on State grounds of a reapportionment expressly designed to comply with Federal requirements.

As a further example, Plans A and B do not fully meet the requirement of Section 5 of Article III that every county (except Hamilton) have at least one Assemblyman. Appellees alleged in the District Court that the Plans are invalid under State law because they "do not respect political subdivisions," and the District Court ruled that the State constitutional requirements to that effect continue to be operative. Yet unless the Legislature uses fractional voting, which the District Court invalidated, compliance with the one-man, one-vote requirement is mathematically impossible if reapportionment is also to provide separate representation for political subdivisions, without vastly increasing the size of the Assembly.

The chaotic implications of strait-jacketing legislatures with former apportionment provisions, when they carry out their reapportionment responsibilities, have been fully realized in New York. The New York Court of Appeals has now held that the State constitutional requirement of an Assembly of 150 members was not part of the apportionment scheme struck down by this Court. *But see WMCA*, 377 U. S. at 654. Thus the State court invalidated Plan A, which had been upheld by the District Court, because it established an Assembly of 165 members. In so holding, the State court cited the ruling by the District Court as to the continuing validity of the apportionment provisions of the State Constitution.* *Matter of Orans*, 15 N. Y. 2d 339 (April 14, 1965).

The decisions of this Court, and the necessities of rational reapportionment, require that State legislatures

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*In fact, plaintiffs-appellees had conceded in the District Court that the State constitutional requirement of a 150 member Assembly necessarily fell with the invalidation of the prior scheme of apportionment, and the District Court did not expressly declare the 150 member requirement to have continuing validity.

be permitted to carry out the reapportionment responsibilities conferred by the Federal courts free of restrictions contained in outmoded apportionment schemes adopted under different sets of assumptions. Otherwise, as in New York, legislatures will be whip-sawed between State and Federal courts, further years of uncertainty will be inevitable, and reapportionment responsibilities will be thrown on the Federal courts rather than on the legislatures where they properly belong.

Conclusion

The New York Legislature has replaced the State's prior apportionment scheme with provisions that comply fully with Equal Protection requirements in a manner designed to implement legitimate, rational State policies. The orders appealed from are erroneous to the extent that they invalidated these provisions.

The Court has jurisdiction of this appeal. The questions presented are substantial and of unusual public importance. Probable jurisdiction should be noted, and the portions of the judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

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April 1965.

Appendices
A, B and C

APPENDIX A

Opinion of the District Court dated February 1, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WMCA, Inc., R. Peter Straus, Joseph De Maio, Edward Lind, S. Thomas Delaney, Edward C. Brown, James J. McCafferty,
Plaintiffs,

against

John P. Lomenzo, Secretary of State of the State of New York; Louis J. Lefkowitz, Attorney General of the State of New York; Francis X. O'Rourke, Chairman, Board of Supervisors, Westchester County and Arthur Cromarty, Chairman, Board of Supervisors, Suffolk County,
Defendants,

and

Paul R. Screvane, President of the City Council of the City of New York; Eugene H. Nickerson, County Executive, Nassau County; Maurice J. O'Rourke, James Power, John R. Crews, Thomas Mallee, Commissioners, Board of Elections, New York City,
Supporting Defendants,

and

John H. Hughes and Lawrence M. Rulison,
Intervening Defendants.

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Opinion of the District Court dated February 1, 1965

APPEARANCES:

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Opinion of the District Court dated February 1, 1965

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Attorney for John H. Hughes and Lawrence M. Rulison
RICHARD S. SCOLARO, Esq., of Counsel

Before WATERMAN, Circuit Judge,
and RYAN and LEVET, District Judges.

WATERMAN, Circuit Judge:

Defendants Lomenzo, Lefkowitz, and Francis X. O'Rourke, and intervening defendants Hughes and Rulison, have moved for an order declaring that the New York State Reapportionment Compliance Act, N. Y. Laws 1964, ch. 976, 977, 978, 979, 981, complies with the order of this court dated July 27, 1964. Defendants Lomenzo and Lefkowitz have also moved for an order enjoining proceedings pending in the New York State Supreme Court to test the validity of the Act under Article III of the New York State Constitution. Plaintiffs supported by defendants Screvane, Nickerson, Maurice J. O'Rourke, and Power, have moved for a contrary order declaring that the Act is in violation of Amendment XIV of the United States Constitution and of Article III of the New York State Constitution. They have also asked that we stay further proceedings in this court pending the outcome of the state court proceedings.

The history of this protracted suit has been fully set forth in *WMCA* v. *Lomenzo*, 377 U. S. 633, 635-41 (1964) and need not be repeated here. In that decision, rendered June 15, 1964, the United States Supreme Court held that "New York's scheme of legislative apportionment," contained in Article III of the New York State Constitution, was in violation of the Equal Protection Clause of the

United States Constitution. The Supreme Court interpreted the Equal Protection Clause to require "that seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis," and it found that "New York's constitutional formulas relating to legislative apportionment demonstrably include a built-in bias against voters living in the State's more populous counties." *Id.* at 653-54.

The case was remanded to this court for further proceedings. Following a hearing, we issued our order, dated July 27, 1964, which decreed in part as follows:

> "2. The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States;
>
> "3. . . . [T]he 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964 or at any special election to fill vacancies shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965. Members so elected to hold office for a term of one year ending December 31, 1966.

* * *

Opinion of the District Court dated February 1, 1965

"6. This Court retains jurisdiction of this case to conduct further proceedings as may be necessary."

On October 12, 1964, defendants Lomenzo and Lefkowitz (hereinafter called the State) filed a jurisdictional statement asking the Supreme Court to reverse our order insofar as it compelled legislative reapportionment by April 1, 1965 and an election pursuant thereto in November, 1965. Shortly thereafter, intervening defendants Hughes and Rulison (hereinafter called the State Senators) filed a similar jurisdictional statement. We have now been informed that the Supreme Court permitted the State to withdraw its appeal on January 22, 1965, but that the appeal by the State Senators is still pending. The subject matter of the appeal, however, is not at issue in the proceedings now before us for disposition; we are here concerned with matters as to which this court has retained jurisdiction.

Meanwhile, on July 12, 1964, in response to the decision of the Supreme Court, the Governor of the State of New York appointed a Citizens' Committee on Reapportionment to study basic reapportionment problems. As soon as the Citizens' Committee had submitted its report on December 1 (hereinafter cited Cit. Comm. Rep.), the Governor called a special session of the Legislature to meet on December 15 to act on reapportionment. By the time the Legislature convened, it also had before it the report of the Joint Legislative Committee on Reapportionment (hereinafter cited Jt. Leg. Comm. Rep.) proposing a reapportionment statute based in part on the recommendations of the Citizens' Committee. Pursuant to the proposals of the two committees, the Legislature enacted its Reapportionment Com-

pliance Act on December 22 and 23, 1964, to take effect January 1, 1965.

The basic act, N. Y. Laws 1964, ch. 976 (hereinafter Plan A), is the most traditional of the four reapportionment schemes enacted but is the one least preferred by the Legislature. It creates and districts a Senate of 65 members and an Assembly of 165 members. The districts are apportioned on the basis of the 1960 citizen population, which is the 1960 federal census population minus aliens. Each member of both houses has one vote in the Legislature.

Three succeeding amendments to the basic act, N. Y. Laws 1964, ch. 977-78, 979, 981 (hereinafter Plans B, C and D), establish reapportionment schemes increasingly preferred by the Legislature but also increasingly novel. Plan B creates and districts a Senate of 65 members and an Assembly of 180 members. The districts are apportioned, not on the 1960 citizen population, but on the basis of the 1962 vote for Governor, including blank and void ballots. As under Plan A, each member of both houses has one vote.

Plan C creates and districts a Senate of 65 members, each with one vote, and an Assembly of 186 members, casting a total of 165 votes. 147 members of the Assembly have a full vote, and 39 members have fractions of a vote ranging from ¾ to ⅙ according to the population of their districts. As under Plan A, districts are apportioned on the basis of the 1960 citizen population.

Finally, Plan D creates and districts a Senate of 65 members, each with one vote, and an Assembly of 174 members, casting a total of 150 votes. As under Plan C, 127 members of the Assembly have a full vote, and 47

members have fractions of a vote ranging from ¾ to ⅛. As under Plan B, districts are apportioned on the basis of the 1962 vote for Governor.

According to the report of the Joint Committee, Plan D is intended to be the law of New York State. However, if "[Plan D] were held to be invalid, [Plan C] would become operative. If [Plan C] were held to be invalid, [Plan B] would become operative. If [Plan B] were determined to be invalid, [Plan A], or so much thereof as a court of competent jurisdiction would determine to be valid, would become operative." Jt. Leg. Comm. Rep. 16

Each plan provides that if the districts described therein contain minor descriptive errors, the Secretary of State shall correct the errors according to standards set forth in the Act (§ 403). Plans B, C, and D also state that if a court shall invalidate the system of fractional voting or the use of a voter population basis, it is the intent of the Legislature that the remainder of any plan incorporating these provisions shall also be invalid (§ 401).

On December 30, 1964, the State filed notice of a motion asking this court to declare that the Act complies with our order of July 27, 1964. The State Senators and defendant Francis X. O'Rourke subsequently supported the State's motion at a hearing before this court held on January 21, 1965. On December 31, 1964, defendant Nickerson (hereinafter called Nassau County) filed notice of a cross-motion, asking this court to declare that the Act violates the Constitutions of the United States and of New York State, and for appropriate relief. Similar notices were later filed by plaintiffs and by defendants Screvane, Maurice J. O'Rourke and Power (hereinafter called New York City).

Opinion of the District Court dated February 1, 1965

At the hearing on January 21, we were informed that on the previous day a Justice of the New York State Supreme Court had ordered state officials to show cause on January 29 why the Act should not be declared invalid under the New York State Constitution (*Matter of Orans*, No. 869/1965). In response to this development, the State moved in open court for an injunction against the state court proceedings, and New York City, supported by Nassau County and plaintiffs, asked us to stay proceedings in this court pending final determination of the proceedings in the state court.

At the close of the hearing, we reserved decision on all the motions in this case. In view of the pendency of the state court proceedings, however, we hastened to file our decree on January 26, with a promise that this opinion explaining our decree would soon follow. In brief, we denied the State's motion for an injunction, we denied New York City's motion for a stay, we declined to pass on claims that the Act is invalid under the New York State Constitution, we ruled that Plans B, C, and D are invalid under the United States Constitution, and we hold that Plan A complies with our order of July 27, 1964.

Claims under the New York State Constitution

Plaintiffs, supported by Nassau County and New York City, claim that the entire Reapportionment Compliance Act violates Article III, Sections 4 and 5 of the New York State Constitution in the following ways: the Act was not adopted at a regular session of the Legislature; the four plans contained in the Act amount to more than one reapportionment every ten years; the adoption of a series of plans to guard against judicial invalidation, and the provision for correction by an executive official, constitute a dele-

gation of legislative power; the districts are not compact and contiguous and do not respect political boundaries. In addition, they claim that Plans B and D violate the sections of the State Constitution listed above in that they do not apportion on the basis of citizen population, and that Plans C and D violate Article III, Section 14 and other provisions of the State Constitution, in that they depart from majority rule within the Legislature.[1]

The State contends that our order of July 27, 1964 invalidated all the provisions of Article III of the New York State Constitution which relate to legislative apportionment, thereby precluding the claims which have been recited. This contention misconstrues the scope of our order.

The order of July 27, 1964 was issued pursuant to the decisions of the United States Supreme Court in *WMCA, Inc.* v. *Lomenzo, supra,* and in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), to which the opinion in *WMCA, Inc.* v. *Lomenzo* referred. In *Reynolds* v. *Sims,* the Supreme Court wrote:

> "[S]tate constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." *Id.* at 584.

Specifically, the Supreme Court ruled:

> "A State may legitimately desire to maintain the integrity of various political subdivisions, insofar

[1]Plaintiffs make no claim that the Act violates the State Constitution because it enlarges the size of both houses of the Legislature.

> as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme . . ., [so long as] the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 578-79.

Similarly, the Supreme Court held:

> "While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative reapportionment." *Id.* at 583-84.

Moreover, for the reasons stated below, we believe that the Supreme Court approved the use of citizen population as a basis for legislative apportionment.

Accordingly, in invalidating "New York's scheme of legislative apportionment," the Supreme Court pointed only to "the state constitutional formulas" by which "the weight of the votes of those living in populous areas is of necessity substantially diluted in effect." *WMCA, Inc.* v. *Lomenzo, supra,* at 653. Our order of July 27, 1964, declaring void "the scheme of legislative apportionment of the State of New York." was deliberately designed to hew as closely as possible, both in wording and connotation, to the decision of the Supreme Court. Even the remedy prescribed in our order involved no conflict with those provisions of the New York State Constitution pleaded by plaintiffs. We decreed that reapportionment should be done by the Legislature; we required the enactment of but

one valid scheme; and we gave the Legislature sufficient time to reapportion during a regular session.

In short, as far as the Federal Constitution is concerned, all the provisions of Article III of the State Constitution relied on by plaintiffs are still operative. Moreover, these provisions are limited in their application only to the extent that they are in unavoidable conflict with the decision of the Supreme Court in *WMCA, Inc.* v. *Lomenzo, supra,* or with the July 27, 1964 order of this court. If, as the State suggests, these provisions of Article III are inseparably intertwined with the "constitutional formulas" condemned by the Supreme Court, so that all must fall together, this would be a consequence of state law rather than federal law.

However, this court declines to pass on plaintiffs' claims that the Reapportionment Compliance Act is invalid under the New York State Constitution. Together with the issue of inseparability, these claims raise difficult problems of state law interpretation; our examination of the briefs of the parties and the cases cited therein makes this fact amply clear. Moreover, we are here concerned with a matter of the utmost sensitivity and importance to the people of the State of New York. Finally, there is presently pending a proceeding in the New York State courts, in which those attacking the validity of the Reapportionment Compliance Act can obtain an expeditious hearing on their claims under state law. N. Y. Const. Art. III. § 5. This is clearly an appropriate case for abstention by the federal courts. See 1A Moore, Federal Practice ¶ 0.203 (1961). Our discussion above of the continued viability of Article III of the New York State Constitution is therefore meant only as a guide to the New York State courts and not as ground-

work for a determination of our own of plaintiffs' claims under state law.

What has already been said provides a sufficient answer to the State's request that we enjoin the proceedings pending in the state courts. Since we are not passing on claims under the State Constitution, and since the proceedings begun in the state courts do not raise claims under the Federal Constitution, there is no possibility here of conflicting adjudications. Neither our jurisdiction nor our judgments are jeopardized, within the meaning of 28 U. S. C. § 2283. See 1A Moore, Federal Practice ¶¶ 0.224, 0.225 (1961). Therefore, the motion for an injunction against the proceedings in the state courts is denied.

Likewise, New York City's motion for a stay of the proceedings in this court, pending the outcome of the proceedings in the state court, is denied. In *Davis* v. *Mann*, 377 U. S. 678, a companion case to *Reynolds* v. *Sims, supra, and WMCA, Inc.* v. *Lomenzo, supra,* testing the validity of Virginia's legislative apportionment under the Federal Constitution, the federal district court refused to stay the federal court action on the claimed ground that "plaintiffs should be required first to procure the views of the state courts on the validity of the apportionment scheme." *Id.* at 683. The Supreme Court approved this determination in the following words:

> "Where a federal court's jurisdiction is properly invoked, and the relevant state constitutional and statutory provisions are plain and unambiguous, there is no necessity for the federal court to abstain pending determination of the state law questions in a state court. *McNeese* v. *Board of Education*, 373

> U. S. 668. This is especially so where, as here, no state proceeding had been instituted or was pending when the District Court's jurisdiction was invoked." *Id.* at 690-91.

This ruling fits our case. There is no dispute between the parties over the meaning of these provisions of the Reapportionment Compliance Act which have been challenged by plaintiffs under the Federal Constitution, and there was no state court proceeding pending when our jurisdiction was invoked on December 30, 1964. Nor can our case be distinguished from *Davis* v. *Mann* on the ground that here a state proceeding was instituted before the proceedings in this court were ready for judgment, or that here it is those challenging the state apportionment scheme who are seeking the stay. We have ordered the Legislature to reapportion itself validly by April 1, 1965, and the Legislature has attempted to obey our order. The State is entitled to know as soon as possible whether our order has been satisfied by what the Legislature has done.

Claims under the United States Constitution

Nassau County contends that the adoption of a series of reapportionment plans, and the invitation to this court to choose among them, is an abuse of our order directing the Legislature to enact "a valid apportionment scheme."

The Joint Committee explained its novel response to our order as follows:

> "[I]t remains impossible to predict with certainty how the [Supreme] Court will resolve all the questions it intentionally left unanswered in this area.

* * * *

Opinion of the District Court dated February 1, 1965

> "The Federal District Court's order of July 27, 1964 specifically requires that 'not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme.'
>
> * * * *
>
> "There is absolute necessity for stability and certainty in the legislative process, and the assurance that the acts of the Legislature will not remain subject to continuing challenge.
>
> * * * *
>
> "Accordingly, we would be derelict in our duty if we recommended to your Honorable Bodies that complete reliance be placed in a single apportionment and districting plan which may or may not withstand constitutional attack." Jt. Leg. Comm. Rep. 15-16.

We find the Joint Committee's explanation persuasive. Under the unique circumstances of this case, it was not an abuse of our order for the Legislature to enact four alternative apportionment plans rather than only one. At worst, insofar as the Legislature's response to our order manifests its doubts about the validity of the plans which have been enacted, the presumption of constitutionality ordinarily accorded to legislation is weakened to some extent. See *WMCA, Inc.* v. *Simon,* 208 F. Supp. 368, 373 (SDNY 1962).

Plaintiffs, supported by Nassau County, claim that Plans D and C, which employ fractional voting in the Assembly, violate the requirement of the Equal Protection Clause that "seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis." *WMCA, Inc.* v. *Lomenzo, supra,* at 653.

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According to the Citizens' Committee and the Joint Committee, the main purpose of fractional voting is to assure that every county in the state, except Fulton and Hamilton, will have at least one Assemblyman all of its own, without the Assembly's being enlarged to over 1000 members. Cit. Comm. Rep. 29-31, 39-40; Jt. Leg. Comm. Rep. 9-13. This policy was endorsed by the Supreme Court in *Reynolds* v. *Sims, supra,* at 580: "[A] State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained."

If voting were the only important function of a legislator, the scheme of fractional voting in Plans D and C would probably not offend "the basic standard of equality" among districts. But legislators have numerous important functions that have nothing directly to do with voting: participation in the work of legislative committees and party caucuses, debating on the floor of the legislature, discussing measures with other legislators and executive agencies, and the like. The Assemblyman who represents only one-sixth of a district can theoretically give each constituent six times as much representation in these respects as the Assemblyman who represents a full district. This disparity of representation persists even if the State is right in arguing that the Assemblyman with only one-sixth of a vote will carry only one-sixth as much political weight when he engages in these activities.

Moreover, fractional districts are enjoyed mainly by the sparsely populated areas of the state. Of the forty-

seven Assemblymen who would cast fractional votes under Plan D, thirty-seven are from counties too thinly inhabited to have any additional representation in the Assembly. Of the thirty-nine Assemblymen who would cast fractional votes under Plan C, thirty-four are from counties too thinly inhabited to have any additional representation in the Assembly. None of the Assemblymen with fractional votes under either plan are from New York City or Nassau County. In view of the Supreme Court's concern for New York's traditional "bias against voters living in the State's more populous counties," *WMCA, Inc.* v. *Lomenzo, supra,* at 654, this imbalance makes fractional voting particularly vulnerable.

The State argues that fractional districts are actually disadvantageous to the people living in them. Its theory is that lobbyists will tend to woo only those legislators with full votes, since more effort is involved in convincing a series of legislators who share one vote. If this be true, it only demonstrates that in some respects fractional voting entails counter-discrimination. It does not prove that fractional voting is entirely free of discrimination.

Accordingly, we hold that Plans D and C violate the XIV Amendment of the United States Constitution and therefore do not comply with the July 27, 1964 order of this court. No doubt is cast on this conclusion by the statement in *Reynolds* v. *Sims, supra,* at 579, that a state "might [legitimately] desire to achieve some flexibility by creating multimember or floterial districts," or by the recent Supreme Court ruling in *Fortson* v. *Dorsey,* 33 L. W. 4143 (Jan. 18, 1965), upholding Georgia's partial use of multimember districts. Unlike a fractional district, the extra-ordinary

population of a multimember district is balanced in all respects by its extra-ordinary number of representatives.[2]

Plaintiffs claim that Plan B violates the XIV Amendment of the United States Constitution by using as a base for legislative apportionment the 1962 vote for Governor rather than the citizen population of the state, and therefore that the scheme does not comply with the July 27, 1964 order of this court. Under the circumstances of this particular case, and limiting ourselves thereto, we agree with plaintiffs.

Since 1894, New York has districted its Legislature by using as an apportionment base the state's citizen population. Now, for the first time in seventy years, the very same body which has been held by the Supreme Court to be malapportioned would switch its apportionment base from citizen population to actual voters. The effect of this switch would be to reduce New York City's share of the total apportionment base from 45.7% to 41.9%. In terms of representation in the Legislature under Plan B, New York City would thereby lose approximately 2½ Senate seats and nearly 7 Assembly seats. Again, in view of the Supreme Court's concern for New York's pre-existing "bias against voters living in the State's more populous counties," *WMCA, Inc.* v. *Lomenzo, supra,* at 654, we cannot condone this ghost of prior malapportionment.

It might be otherwise if the Legislature had acted under the impression that a voter base was required by the United States Constitution, but this was not the case. The Citizens' Committee reported that the continued use of

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[2]We express no opinion on the use of fractional or weighted voting either as a temporary device to remedy malapportionment or in governmental organs below the state level.

the citizen base for legislative apportionment "would raise few, if any, legal problems" under the Federal Constitution. Cit. Comm. Rep. 12. The Joint Committee apparently agreed, for it based its ultimate statutory backstop, Plan A, on citizen population. We do not mean to suggest that there may not be sound policy reasons for changing the state's base for legislative apportionment from citizen population to actual voters. See Cit. Comm. Rep. 14-15; Jt. Leg. Comm. Rep. 7-8. We say only that under the particular circumstances within which this change actually occurred, these policy reasons are not sufficient to dispel the inference of discrimination against city-dwellers.[3]

Nassau County claims that Plan A, by basing apportionment on citizens rather than on residents, violates the requirement of the Equal Protection Clause that "seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis." *WMCA, Inc.* v. *Lomenzo, supra,* at 653.

It is true that in its series of decisions on June 15, 1964, the Supreme Court repeatedly stated its fundamental holding in terms of equality of "population." But a crucial passage in *Reynolds* v. *Sims, supra,* at 577, convinces us that "population" may mean the total number of citizens as well as the total number of residents. The Supreme Court stated:

> "[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as

[3]We express no opinion on the validity of a voter basis under other circumstances. See *Reynolds* v. *Sims, supra,* at 577, quoted *infra,* at p. 24.

> nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of *residents, or citizens, or voters.* Mathematical exactness or precision is hardly a workable constitutional requirement." (Emphasis supplied.)

The opinion in *WMCA, Inc.* v. *Lomenzo, supra,* confirms this interpretation. The Supreme Court recited the provisions of Article III of the New York State Constitution requiring apportionment of the Senate and the Assembly on the basis of citizen population, *id.* at 642, 646; the Court expressly noted the fact that "New York uses citizen population instead of total population, excluding aliens from consideration, for purposes of legislative apportionment," *id.* at 641; and in demonstrating the arithmetical inequities of the state's scheme of legislative apportionment, the Court based its calculations on citizen populations, *id.* at 647-51. Nowhere in the opinion, however, did the Supreme Court even intimate that New York's use of a citizen population base for purposes of legislative apportionment contributed in any way to the unconstitutionality of the state's scheme.

It should also be noted that a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State. New York City's share of the total apportionment base would rise only from 45.7% to 46.4%, and Nassau's County's share would actually drop from 7.9% to 7.7%. In terms of representation in the Legislature under Plan A, New York City would thereby gain less than one-half of a Senate seat and only a little more

than one Assembly seat. It would appear that New York's use of its traditional citizen population base, rather than a novel resident population base, affects all areas of the state substantially equally.

Plaintiffs, supported by Nassau County and New York City, claim with great vehemence that Plan A violates the XIV Amendment of the United States Constitution, because it allegedly gerrymanders the state for partisan political advantage.

At the start of the hearing on January 21, 1965, we ruled that these attacks "do not raise questions under the Federal Constitution, and consequently we request of you that you devote none of your time in addressing us with reference thereto" (S. M. 10-11). At the same time, upon objections by the State, we denied petitions to intervene by Noel Austin, by the Village Independent Democrats and four of their members, and by the City of Rochester, in part on the ground that they raised issues relating only to political gerrymandering. An amplification of our ruling is here in order.

As we pointed out at the hearing:

> "We have noted the descriptions and have examined the maps that have been made available to us showing the perimeters of the senatorial and assemly districts adopted by the State Legislature last month, and we do not find that in comparing the inhabitants, citizens or voters in any districts with those of any other districts there has been any invidious discrimination relative to any person's race, color, creed, national origin or sex; and none such has been alleged in any of the petitions brought before us for

declaratory judgment today and none has been filed by any of the present parties in this cause." (S. M. 9-10).

Consequently, this case is not governed by *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), in which the Supreme Court held that redrawing the boundaries of a city in order to exclude Negro voters constitutes a violation of the XV Amendment of the Federal Constitution. Even if voters, merely shifted from one legislative district to another, can be said to have had their right to vote "denied or abridged," within the meaning of that constitutional provision, the gerrymandering alleged here was not based on "race, color, or previous condition of servitude."

Nor is this case influenced by *Wright* v. *Rockefeller*, 376 U.S. 52 (1964), in which the Supreme Court may have intimated that drawing legislative districts in order to separate native-born whites from Negroes and Puerto Ricans constitutes a violation of the XIV Amendment of the Federal Constitution. As the dissenters pointed out, state-sponsored segregation based on race, religion, or ancestry is peculiarly vulnerable to constitutional attack. *Id.* at 61-62, 68-69. The integration of Democrats and Republicans, or of Liberals and Conservatives, has no such privileged status under the Federal Constitution.

At the hearing we went on to say:

"Under the provisions of the Fourteenth Amendment of the United States Constitution [as expounded in *Reynolds* v. *Sims*] this Court, with reference to the shape, size or population density of a district, is only required to ascertain whether a

> vote for assemblyman or senator in one district is debased or diluted in relation to a vote for assemblyman or a senator in another district, and to ascertain whether these districts are so constructed as to contain within them as nearly equal populations as is practicable." (S. M. 10).

In short, *Reynolds* v. *Sims* concerned arithmetic and not geometry.

Since plaintiffs have neither argued nor proved that the alleged political gerrymandering has produced districts of unequal populations, this suit does not come within the purview of *Reynolds* v. *Sims*. It is true that the opinion in that case treated partisan gerrymandering as an evil which a state may legitimately seek to preclude. *Id.* at 578-79, 581. But *Fortson* v. *Dorsey, supra,* at 4145, makes it clear that the Supreme Court has refrained from condemning partisan gerrymandering as unconstitutional.

Plaintiffs make no claim that Plan A creates legislative districts not substantially equal in citizen population and that it thereby violates the XIV Amendment of the United States Constitution. However, in view of the Supreme Court's ruling in *WMCA, Inc.* v. *Lomenzo, supra,* at 653, that "seats in both houses of a bicameral state legislature must be apportioned substantially on a population basis," we think it advisable to satisfy ourselves that the Legislature has complied with the Equal Protection Clause in this respect.

In its series of decisions on June 15, 1964, the Supreme Court repeatedly tested equality of legislative apportionment by calculating the population ratio of the largest and smallest districts in the state and by determining the mini-

mum percentage of persons in the state represented by a majority of the legislature. A perfectly apportioned legislature would show a population ratio of 1:1 and a minimum percentage of 50.1%. Of the legislative apportionment schemes condemned by the Supreme Court, Virginia's came closest to perfect equality, with population ratios between the largest and smallest districts of 2.65:1 in the Senate and 4.36:1 in the House, and with minimum percentages of persons represented by a legislative majority of 41.1% in the Senate and 40.5% in the House. *Davis* v. *Mann, supra,* at 687-89. On the other hand, the Supreme Court indicated that Colorado's House, with a population ratio of 1.7:1 and a minimum percentage of 45.1%, was "at least arguably apportioned substantially on a population basis. . . ." *Lucas* v. *Colorado Gen. Assembly,* 377 U. S. 713, 727, 730 (1964).

Under Plan A, the ratio of citizen populations between the largest and smallest districts in New York is 1.15:1 in the Senate and 1.21:1 in the Assembly, while the minimum percentage of citizens represented by a majority of the New York York Legislature is 49.4% for the Senate and 49.3% for the Assembly. These minor deviations from perfect equality are clearly permissible under the Federal Constitution. "Mathematical exactness or precision is hardly a workable constitutional requirement." *Reynolds* v. *Sims, supra,* at 577.

Testing Plan A for "bias against voters living in the State's more populous counties," *WMCA, Inc.* v. *Lomenzo, supra,* at 654, we reach the same result. In a perfectly apportioned scheme, New York City would have 29.7 out of 65 seats in the Senate and 75.4 out of 165 seats in the Assembly. Under Plan A, New York City actually receives

30 seats in the Senate and 75 seats in the Assembly, and it shares one additional seat in each house with neighboring counties. Likewise, Nassau County is mathematically entitled to 5.1 seats in the Senate and 13.0 seats in the Assembly. It actually fills 4 seats in the Senate and 12 seats in the Assembly, and it shares two additional seats in each house with neighboring counties.

Accordingly, we hold that Plan A complies with the XIV Amendment of the United States Constitution and with our order of July 27, 1964. Of course, the ultimate fitness of the scheme for their needs and purposes is for the people of the State of New York, themselves, to decide, and not for this court to mandate.

February 1, 1965.

(signed) STERRY R. WATERMAN
U. S. Circuit Judge

(signed) SYLVESTER J. RYAN
Chief Judge of the U. S. District Court for the Southern District of New York

(signed) RICHARD LEVET
U. S. District Judge

We append here our decree filed January 26, 1965.

APPENDIX B

Order of the District Court dated July 27, 1964

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WMCA, INC., *et al.*, *Plaintiffs,* *vs.* JOHN P. LOMENZO, Secretary of State of the State of New York, *et al.*, *Defendants.*	61 Civ. 1559

ORDER ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

The United States Supreme Court having rendered its order and judgment on the appeal taken from the order of this Court dated August 17, 1962 and entered August 27, 1962 and having remanded this case to this Court for further proceedings consistent with the views stated in its opinion in this case and in Reynolds v. Sims (Nos. 23, 27 and 41, Oct. Term, 1963, dec'd June 15, 1964), and pursuant to Rule 59 of the Revised Rules of the Supreme Court of the United States, the mandate of that Court having issued on July 10, 1964, IT IS HEREBY ORDERED THAT:

1. Pursuant to Rule 34 of the Rules of this Court, the order and judgment of the Supreme Court of the United States be, and it hereby is, made the order and judgment of this Court;

Order of the District Court dated July 27, 1964

2. The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States;

3. Inasmuch as the primary elections of June 2, 1964, had been held and nominees chosen prior to the decision of the Supreme Court of June 15, 1964, and in view of the imminence of the 1964 election of Members of the New York State Legislature and in order to give the New York State Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, the 1964 election of Assemblymen and Senators shall be conducted as presently scheduled; provided that the terms of said Members so elected on November 3, 1964, or at any special election to fill vacancies, shall expire on December 31, 1965, and providing further that not later than April 1, 1965, the Legislature shall have enacted into law a valid apportionment scheme that is in compliance with the XIV Amendment of the United States Constitution and which shall be implemented so as to effect the election of Members of the Legislature at the election in November, 1965,. Members so elected to hold office for a term of one year ending December 31, 1966;

4. That the Members of the New York Legislature elected at said general election to be held on Novmber 3, 1964, and such Members, if any, as may be elected at any special election during the year 1965 to fill vacancies in the New York Legislature, shall have for the calendar year 1965 only the full powers and privileges presently prescribed;

Order of the District Court dated July 27, 1964

5. Plaintiff's application for further injunctive relief is denied without prejudice to renewal upon notice for good cause shown; and

6. This Court retains jurisdiction of this case to conduct further proceedings as may be necessary.

Dated: New York, New York
July 27, 1964

(signed) STERRY R. WATERMAN
U. S. Circuit Judge

(signed) SYLVESTER J. RYAN
U. S. District Judge

(signed) RICHARD H. LEVET
U. S. District Judge.

Order of the District Court dated January 26, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WMCA, INC., *et al.*, *Plaintiffs,* *vs.* JOHN P. LOMENZO, Secretary of State of the State of New York, *et al.*, *Defendants.*	61 Civ. 1559

Before:

HON. STERRY R. WATERMAN,
Circuit Judge,

HON. SYLVESTER J. RYAN,

HON. RICHARD H. LEVET,
District Judges.

Upon all the motion papers, papers in opposition thereto, and proceedings in open court on January 21, 1965, IT IS ORDERED:

1. Article III of the New York State Constitution is invalid under Amendment XIV of the United States Constitution only to the extent that its provisions are in unavoidable conflict with the decision of the United States Supreme Court in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964) and with the order of this court dated July 27, 1964.

2. This court has not passed upon claims that the Reapportionment Compliance Act is invalid under Article III

of the New York State Constitution because of its contents or the manner in which it was enacted.

3. The motion requesting an injunction against pending proceedings in the New York State courts, testing the validity of the Reapportionment Compliance Act under Article III of the New York State Constitution, is denied.

4. The motion requesting a stay of the proceedings in this court, pending the outcome of the proceedings in the New York State courts, is denied.

5. The Reapportionment Compliance Act, as amended by Chapter 981 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

6. The Reapportionment Compliance Act, as amended by Chapter 979 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

7. The Reapportionment Compliance Act, as amended by Chapters 977 and 978 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

8. The Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, complies with the order of this court dated July 27, 1964.

Order of the District Court dated January 26, 1965

9. Jurisdiction of further proceedings which may be found to be necessary in this court is retained.

An explanatory opinion will follow shortly.

(signed) STERRY R. WATERMAN
Circuit Judge

(signed) SYLVESTER J. RYAN
District Judge

(signed) RICHARD H. LEVET
District Judge.

Done at New York City, January 26, 1965

Order of the District Court dated February 16, 1965

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

WMCA, INC., *et al.*, *Plaintiffs,* *vs.* JOHN P. LOMENZO, Secretary of State of the State of New York, *et al.*, *Defendants.*	61 Civ. 1559

Before:

HON. STERRY R. WATERMAN,
Circuit Judge,

HON. SYLVESTER J. RYAN,

HON. RICHARD H. LEVET,
District Judges.

Upon all the motion papers, papers in opposition thereto, and proceedings in open court on January 21, 1965, it is hereby ordered that the order heretofore filed in this proceeding on January 26, 1965, be and the same hereby is resettled to read as follows:

1. Article III of the New York State Constitution is invalid under Amendment XIV of the United States Constitution only to the extent that its provisions are in unavoidable conflict with the decision of the United Staes Supreme Court in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633 (1964) and with the order of this court dated July 27, 1964.

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2. This court has not passed upon claims that the Reapportionment Compliance Act is invalid under Article III of the New York State Constitution because of its contents or the manner in which it was enacted.

3. The motion requesting an injunction against pending proceedings in the New York State courts, testing the validity of the Reapportionment Compliance Act under Article III of the New York State Constitution, is denied.

4. The motion requesting a stay of the proceedings in this court, pending the outcome of the proceedings in the New York State courts, is denied.

5. The Reapportionment Compliance Act, as amended by Chapter 981 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

6. The Reapportionment Compliance Act, as amended by Chapter 979 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

7. The Reapportionment Compliance Act, as amended by Chapters 977 and 978 of the Laws of 1964, does not comply with the order of this court dated July 27, 1964, because it is in conflict with Amendment XIV of the United States Constitution.

Order of the District Court dated February 16, 1965

8. The Reapportionment Compliance Act, Chapter 976 of the Laws of 1964, complies with the order of this court dated July 27, 1964.

9. Plaintiffs' application for further injunctive relief is denied except that the defendants are enjoined from taking any steps or proceedings to effectuate the provisions of the Reapportionment Compliance Act as amended either by Chapter 981, Chapter 979 or Chapters 977 and 978 of the Laws of 1964.

10. Jurisdiction of further proceedings which may be found to be necessary in this court is retained.

(signed) STERRY R. WATERMAN
Circuit Judge

(signed) SYLVESTER J. RYAN
District Judge

(signed) RICHARD H. LEVET
District Judge.

Done at New York City, February 16 1965.

APPENDIX C

Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice Pres-

ident, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE III—LEGISLATURE

§ 2. [*Number and terms of senators and assemblymen.*]

The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen for two years. The assembly shall consist of one hundred

and fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years. Amended by the people Nov. 2, 1937.

§ 3. [*Senate districts continued.*]

The senate districts described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article. Added on approval by the people on Nov. 6, 1962, eff. Jan. 1, 1963.

§ 4. [*Readjustments and reapportionments; when federal census to control.*]

Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any

civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as

practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, andothe whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law re-

adjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts. Amended by vote of the people Nov. 3, 1931; amended and approved Nov. 6, 1945, eff. Jan.1, 1946.

§ 5. [*Apportionment of assemblymen; creation of assembly districts.*]

The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be ap-

portioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board

of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same. Amended and approved by the people Nov. 3, 1931; Nov. 6, 1945, eff. Jan. 1, 1946.